IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision : December 5th , 2007

OMP No. 235 of 2003

MMTC Ltd ..... Petitioner

! Through: Mr.Naveen Kumar, Advocates

Vs.

$ M/s.Irano Hind Shipping Co. ..... Defendant

^ Through : Mr.Siddharth Mridul,Sr.Advocate with Mr.Manoj Khanna, Advocate.

CORAM :-

*** HON'BLE MR. JUSTICE ANIL KUMAR**

1. Whether reporters of Local papers may be allowed to see the judgment? YES
2. To be referred to the reporter or not ? YES
3. Whether the judgment should be reported in the Digest? YES

ANIL KUMAR, J. (Oral)

1. This is a petition under section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the arbitral award dated 15th November, 2002 passed by a majority of arbitrators, Mr. P.M. Abraham and Mr.N. Sukumaran, in the matter of disputes relating to M.V. Dehkhoda-Charter Party dated 17th May, 1995.

2. The petitioner is a Government Company engaged in the business of import and export of several commodities. The respondent is a company incorporated under the laws of Iran and is in the business as carriers by sea.

3. The brief facts of the case are that the petitioner entered into a contract no. 10/1995 with the Ministry of Food, Government of Bangladesh for export of 50,000 MT of non-Basmati Rice. With a view to fulfill its contractual obligations, the petitioner entered into a charter party agreement dated 17th May, 1995 with the respondent who leased out MV vessel, Dehkhoda for carriage of 12,300 MT of bagged rice from ½ safe berths, safe Anchorages Madras to ½ safe berths, safe Anchorages Chittagong and /or Mongla.

4. As per the petitioner the MV Dehkhoda arrived at the Madras port on 20th May 1995 and on completion of loading of the cargo at the Madras port on 7.6.1995 the vessel MV Dehkhoda proceeded to the first discharge port at Chittagong in Bangladesh where it arrived and after the cargo was discharged on 28.6.1995 the vessel proceeded to the last and final discharge port Mongla where the discharge was completed on 20.7.1995.

5. As per the respondents since the vessel utilized 12 days, 19 hrs and 40 min in excess allowable lay time, the respondents had earned a demurrage of US$57,690/- and after giving credit to the petitioner herein for commission on freight, dispatch at the load port, brokerage on commission, the amount due and payable by the petitioner to the respondent was a sum of US $92,440.51 which was claimed by the respondent from the petitioner.

6. A certificate report dated 9th August 1995 was issued by the SGS limited which inspected the cargo on board. Thereafter the ministry of Food, Government of Peoples Republic of Bangladesh, made a provisional claims of US$1,92,699.78 on account of shortage of consignment of 727.169 MT bagged rice including 12.822 MT damaged and 303.278 MT beyond specification. It was also contended that the final claim will be preferred by the Ministry of Food as per the contract.

7. Thereafter the respondents vide letter dated 25.10.1995 addressed to M/s J.M. Baxi and Co., respondents local agents, requested the petitioner to remit an amount of US $92,440.51. The respondents also sent along with the letter, the statement of account,

lay time calculation and receipt of 90% freight. The petitioner intimated the respondents that the vessel had delivered 412.410 MT less cargo than the bills of lading quantity and intimated that 12.822 MT was received in a damaged conditions at Chittagong and the Mongal Ports. A fax message dated 20th September, 1996 was sent to the respondents' local agents conveying that a sum of US$49,022.20 was processed and sent to F&A department for release of payment, however the same was provisional in nature.

8. An explanation was thereafter sought by the respondents towards reduction in the amount claimed (US$92440.51) and the amount authorized for remittance (US$49022.20) to which the petitioner replied explaining that the main difference was because the lay time was calculated from 20th June, 1996 in accordance with the remarks at port and not from 12.6.1995 as calculated by the owners and that the total over-age premium deducted was US$8594.86. Thereafter the respondents sent a notice dated 2.5.1998 claiming the principal amount of US$92400.51 along with interest accrued therein at the rate of 24% per annum amounting to US$55,554.96 which became due to the respondents 90 days from the date of completion of discharge of cargo i.e. 22nd July 1995 to 31st October 1995 .

9. On account of failure on the part of the petitioner in remitting the payment in terms of the charter party agreement, a reference was made to arbitration under clause 37 of the Charter party and a claim of US$ 147995.47 being the principal amount and interest @ 24% per annum was submitted before the arbitrator. The petitioner denied the statement of claims filed by the respondent and relying upon clause 8 and 35 of the Charter party agreement stated that the respondents should have exercised lien on cargo in respect of its claim for demurrage, instead the respondents opted to keep quite. The petitioner further during the proceeding before the arbitrator filed a counter claim on 12.1.2000.

10. The claims of the claimants/respondents and the counter claims of the petitioners were as under:-

"A. Claims of the claimants/respondent:-	US$
i) Balance 10% freight:	37,026.38
ii) Add Demmurage at the dispatch ports:	57,690.00
Less 3.75% commission on demurrage: 2,163.37	55,526.63
Less Despatch at the load port:	112.50
	922,440.51

B. Counter Claims of the petitioner:-	US$
i) Short delivery and delivery of damaged. cargo to receivers	1,11,410.78

ii) Dispatch at load port:	276.56
iii) Dispatch at discharge port:	7,945.83
v) Over Age Insurance Premium (OAP):	8,594.86
v) Gear hire charges:	793.55
	1,29,021.58

11. The learned arbitrators after considering the Charter party agreement and other relevant factor passed an arbitral award on 15th November, 2002 which is as under :-

> "To sum up the respondents shall pay the following claims to the claimants:-
>
> Balance 10% freight after adjustment of dispatch at load port and demurrage at discharge port. US$ 58,074.42
>
> Less; 10% value of damaged cargo of 12.822MT US$ 1,679.68
>
> US$ 56,394.74

12. The aforesaid award passed by the learned arbitrator is under challenge by means of a present petition on the grounds that the same is against public policy and is erroneous and that the same was based on assumptions and surmises. The petitioner contended that since the respondents did not make any attempt to exercise its lien, the same resulted in forfeiture of its right to claim demurrage from the petitioner thereby discharging the petitioner of any liability for demurrage. The petitioner further asserted that there was no bar on the exercise of lien by the respondent and that clause 35 of the

charter party provided complete protection and that the petitioner cannot be saddled with any liability arising from the negligence of the respondents.

13. The Petitioner has mainly challenged the majority maritime award dated 15th November, 2002 made by Mr.P.M. Abraham and Mr.N. Sukumaran contending that the award is contrary to the public policy of India as contemplated in ONGC Vs. Saw Pipe Limited, Civil Appeal no.7419 of 2001 decided by the Apex Court by order dated 17th April, 2003 on the ground that the award is in violation of statutory provisions and cannot be said to be in public interest and consequently the award is likely to adversely affect the administration of justice. According to the petitioner, clause 38 of the Charter Party clearly required the Tribunal to confine itself to the Charter Party Contract entered into between the parties. The plea of the petitioner is that perusal of the relevant clauses 8, 35 and 41(b) of the Agreement, it is apparent that there was no bar on the exercise of lien by the respondent. In any case, it is contended that exercise of lien was not impossible and therefore as the respondent did not exercise its lien, it lost its right to claim the demurrage and the balance freight from the petitioner. Learned counsel for the petitioner has very emphatically contended that clause 35 fully protects the petitioner

from liability as there was no local law or practice in Bangladesh by which lien could not be exercised by the respondent. The petitioner has contended that the majority award is liable to be set aside as it is contrary and in breach of Charter Party Contract and on account of breach committed by the respondent in not exercising its lien over the goods, the petitioner cannot be saddled with any liability arising from the negligence of the respondent in the facts and circumstances.

14. The petition is contested by the respondent contending that in terms of clause 8 of Charter Party though respondent had a lien on the cargo for freight, dead freight, demurrage and the petitioner was responsible for the demurrage only to the extent, the claimant/respondent was unable to obtain the payment of demurrage from the foreign buyer by exercising lien over the cargo. Relying on clause 41 B of the Charter Party, it was contended that balance 10% freight together with demurrage had become payable by Charters/petitioner only within 90 days of completion of discharge. Therefore, the lien could be exercised by the respondent only when money became due, as the demurrage was not payable until the expiry of 90 days after discharge and in these circumstances the claimant/respondent could not lawfully and in accordance with Charter Party Terms exercise lien on the cargo at a discharge port.

It is also contended that the Arbitrators were apprised of the legal and practical difficulties at the port of discharge due to which lien could not be legally and practically exercise as the lien clause was not incorporated in the bills of lading number 1/1 and 1/2 dated 31st May, 1995. Therefore, against the receiver of the goods, the claimant/respondent was never in position to assert the lien in order to recover the balance of freight and demurrage at the discharged ports. Relying on clause 41 (B) it is contended that since the respondents could not exercise lien on the cargo for balance freight and demurrage at the discharge port, therefore, the petitioner is liable for the same. Inability and impossibility to exercise the lien was also contended on the ground that the bills of lading had been marked as `freight pre paid' and as per settled law once "freight pre paid" bills of lading were issued, no lien could be exercised for balance freight over the cargo of an innocent third party and even Bangladesh law does not provide for lien on the cargo of receiver nor such a lien could be exercised where the bills of lading were marked "freight pre paid". Factually also, it is contended that there was no storage facility at the discharge port and therefore, it was impossible and impracticable to exercise lien at the discharge port and in the circumstances right of lien was not effective as the receiver was the Government of Bangladesh and the owner of cargo certainly would not have

permitted the cargo to be liened.

15. Perusal of the majority award reflects that the arbitrator has considered the respective pleas of the parties specially clause 8, clause 26, clause 35 and clause 41 which are reproduced hereinafter:

> "Cl.8: Lien Clause
>
> Owners shall have a lien on the cargo for freight, deadfreight, dumrrage. Charters shall remain responsible for deadfreight and demurrage incurred at port of loading. Charterers shall also remain responsible for freight and demurrage incurred at port of discharge, but only to such extent as the Owners have been unable to obtain payment thereof by exercising the lien on the cargo".
>
> Cl.26:
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> At discharge Port(s) Notice of Readiness to be tendered and accepted after obtaining fee pratique, plant inspection, fumigation, if required, and after vessel's entrance into berth. If docking is prevented due to berth being occupied. Notice of Readiness to be tendered by cable after free pratique, plant inspection and fumigation, if required. Fumigation and plant inspection if required, to be to Charterers and Receivers time and expense. Notice of Readiness to be tendered and accepted at office of Receivers at or before 4 P.M. Or before 1200 noon if Thursday and lay time shall count 24 hours thereafter."
>
> Cl.35:
>
> All liability of Charterers shall cease on completion of loading, owners having lien on cargo for freight, dead freight and demurrage."
>
> Cl.41:

(A) Freight is payable in U.S. Dollars at London (U.K) by telegraphic transfer to:-

Freight payable to : Freight to be remitted to US$ A/C No.

105551-102, at State Bank of India,
1 Milk Street, London EC2P 2JP,
Beneficiary: Irano-Hind Shipping Co.,
TEHRAN"

(B) 90% of the freight payable within (7) working days of submission of freight bill, in triplicate, by the Indian broker on behalf of Owners to Charterers. The balance 10% of the freight together with demurrage (if any) or less despatch (if any) is payable by Charterers within 90 (Ninety) days of completion of discharge on production of (i) copy of Charter party (ii) copy of Bills of Lading (iii) receipt for payment of dispatchers fee at the loading port (s) (if applicable)."

16. The majority award has interpreted the implication of clauses, 8, 26, 35 and 41. The plea of the petitioner that clauses 8, 26 and 35 exonerates them from paying the demurrage at the discharged port was considered as also the plea of the respondent that it was impracticable and impossible to exercise lien on the cargo giving the environment in which they were placed. The relevant clause of majority award in respect of impracticability and impossibility of exercise of the lien by the respondent being paras 10.2 to 10.7 are reproduced hereinafter:

"10.2 We have carefully considered the arguments advanced by both parties and the various documents including court decisions cited by the parties in support of their respective stands. The CP/P terms have to be viewed and interpreted as a single cohesive document and any seeming inconsistency between specific Clauses have to be viewed in the above context. Apparently Clause 8 gives a lien for the claimant on the cargo for demurrage at the discharge port with the Charters remaining responsible only to such extent, as the owners have been unable to obtain payment thereof by exercising lien on cargo. According to Clause 35, all liability of Charters shall cease on completion of loading; owners having lien on cargo for freight, deadfreight and demurrage. At the same time as per Clause 41B, 10% balance freight together with demurrage, if any, is payable by Charterers within 90 days of completion of discharge on production of certain specified documents. This naturally raises a question as to the point of time at which the Claimant would have to exercise their right of lien under Clause 8. It seems quite obvious from Clause 41B that the 10% balance freight and demurrage is payable within 90 days of completion of discharge and that too on production of certain specified documents. When the Respondents in this case under the charter party have upto 90 days from completion of discharge to pay the 10% balance freight and demurrage, it would seem to be an impossibility for Claimants to exercise his right of lien which can best be done when the cargo was still in his possession and control. It is obviously not realistic to expect the Claimants or anyone similarly placed to anticipate a default on the part of Respondents to pay the 10% balance freight and demurrage and exercise lien and withhold the release of the cargo either prior to or during or even immediately on completion discharge.

10.3 We have also considered the question whether the Claimants could have reasonably exercised

his lien on the cargo under the facts and circumstances of this case. The lien Clause has been the object of scrutiny and analysis in a number of judicial pronouncements and what stands out from these is that it is not sufficient to merely give a right of lien to Claimants but that right has to be an effective one. In the "SINOE" (Lloyd's Law Reports, 1972 Volume I) Lord Denning pronounced that "It seems to me that once it is accepted that the two parts of the Clause are coextensive, then it is sensible to require that the lien should be an effective lien. It is no use for the shipowner to be given a right of lien unless he can exercise it so as to get the money due to him ..... So I would hold the lien for demurrage must be effective at the time of discharge of cargo-unless it is so, the Charterers are not relieved of their liability" (Page 204-205). If the case of Respondents is, as in this case, that the Claimant had a practicable and effective right to exercise lien on the cargo then it is for the Respondents to establish that it is in fact so. After analysing various judgments having bearing on this subject, M/s.Julian Coke, John Kimball, Timuthy Young, David Martowski, Andrew Young and Leray Lambert in their book "Voyage Charters" (Lloyd's of London Press, 1993) have concluded as follows "As the law is clearly that the cessation of liability is coextensive with the creation of an effective lien, the charterers ought to establish that there is a lien and that it is effective in order for their liability to cease." (Page 342). In this case the Respondent has not even attempted to establish that the Claimants have an effective lien under the facts and circumstances of this case.

10.4: It is also clear that it would have been impracticable for the Claimants to exercise the lien. It may be recalled that the Claimants' cause of action is in respect of 10% balance freight and demurrage at the two discharge ports. The partial discharge was completed at Chittagong on 28.06.1995 and the balance at Mongla on

20.7.1995, where the demurrage claims had arisen. Under Clause 41 B of C/P the Respondents are required to settle the balance freight and demurrage claim within 90 days from the date of completion of discharge i.e within 90 days after 20th July, 1995. The Respondents have been claiming till their revised laytime statement was given to the Arbitration Tribunal on 16.11.2001 that instead of demurrage payable to the Claimants, despatch is owed to them by the Claimants. When the fact of demurrage, not to speak of its quantum, is repudiated by the Claimants, it becomes all the more difficult, if not impossible, for the Claimants to take any concrete step in pursuance of their right of lien even if the implications of Clause 41B are ignored for the sake of argument. The Claimants could have effectively exercised his lien only by stopping the delivery of cargo at some point of time when the ship was still at berth. No port will allow a ship to idle merely because the ship owner is in the process of exercising some right of his against the Charterer/Cargo receiver. Any such action on the part of shipowner would have resulted in the ship losing her discharging turn and in order to regain her turn the shipowner would have had to join the ships queing for discharge at the port. This is not a feasible option for any shipowner to take especially in Bangladesh ports where delays in getting berths and delays caused by cyclones etc are by no means unusual. The fact that in this very case the ship had to wait for 9 days to enter berth due to bad weather should not be lost sight of.

10.5 The vessel owner will have a lien on the charterer's cargo only so long as he retains possession of the cargo. In this case the Shipper/Charterer is MMTC, a Public Sector Undertaking and the Cargo Receivers are the Bangladesh Government. The original Bills of Lading issued to MMTC have been endorsed to the Bangladesh Government. Even though the Charter party does not mention that the Bills of Lading shall be deemed to contain all the conditions of the charter party, neither the

Claimants nor the Respondents have produced before the Tribunal the original Bills of Lading and it is not, therefore, clear whether the endorsee as an innocent third party has been made aware of the charter party provisions and that the Claimants have a lien on the cargo. Further it is noted that the Bills of Lading have been endorsed "Freight Prepaid" and under these circumstances it is neither possible or legal for the vessel owner to deny delivery of the cargo to an endorsee especially if it is the Government of Bangladesh. It is therefore clear to us that it would have been impracticable to exercise lien in the Bangladesh port and any attempt to exercise lien while the ship was in Bangladesh waters would have invited serious consequences for the ship perhaps including seizure of the vessel. We hold that under the facts and circumstances of this case, the lien given by Clause 8 was not an effective or practical one and therefore failure to exercise the lien does not weaken much less invalidate the right of Claimants to recover demurrage at discharge port from the Respondents. Similar ineffectiveness of the lien is applicable to recovery of freight also and therefore clause 35 which exonerates the Charterer of all liability for freight also and demurrage cannot have any effect. So far as freight is concerned Charterer has not disputed his liability to pay 10% balance freight despite the working of cesser value 35. In other words, in our view either clause 35 is applicable in toto or not applicable at all against the Claimants and cannot be truncated and invoked to suit respondent's convenience.

10.6 As regards Clause 41 B it clearly provides that the balance 10% freight together with demurrage is payable by Charterers within 90 days of completion of discharge. It may be noted that this a typed Clause in its entirety; whereas Clause 8 (lien clause) is a printed clause with some minor deletions concerning damages for detention to vessel which is irrelevant to the subject case. It has

been held by the Queens Bench in the UK (Justice J. Mocatta) in the ATHINOULA case that "It is well established, where there was a conflict between a typed Clause and printed Clause, the typed Clause should prevail" and hence Clause 41B being the typed clause prevails over the printed lien clause 8. Apart from this in the same typed clause prevails over the printed lien clause 8. Apart from this in the same ATHINOULA case similar situation prevailed with regard to Lien Clause and Freight/Demurrage payment Clause viz. Demurrage would be paid by charterers within one week after presentation of the Statement of Facts and time Sheet for the voyage and since these things cannot take place until after the cargo has been discharged and by then the possibility of exercise of lien would have vanished and in the circumstances Justice Mocatta Held that the Charterers were liable to owners for discharge port demurrage. In the case of M.V. DEHKHODA also the demurrage as well as balance 10% freight became payable by Respondents within 90 days of completion discharge. Hence, the question of exercising lien for demurrage at discharge port either during or immediately on completion of discharge would have been a breach of Clause 41 B of the Charter Party as the demurrage was only accruing due but not yet due, till completion of discharge and submission of certain documents and as argued in the above case a lien can only be exercised for money actually due and not for sums accruing due but not yet due. Moreover as stated earlier there was divergence in calculation of laytime at discharge ports between the Respondents/Receivers and the Claimants; while the respondents maintained that despatch was earned at discharge ports, the claimants all the while maintained that the vessel had incurred demurrage. In such a situation of diametrically opposite positions, it is all the more difficult to ascertain with any degree of certainty as to when to trigger clause 8 of the C/P for exercising lien.

> 10.7 It is plausible to argue that given the right of lien by the Claimants under clause 8 of C/P it was incumbent on them to attempt to exercise lien for recovery of demurrage at discharge port and their failure to do so is fatal to their right to proceed against the respondents. The Tribunal is unable to subscribe to this view. Clause 41 (B) contemplates the completion of discharge, the submission of specific documents by the Claimants and the payment to the Claimants of balance 10% freight and demurrage within 90 days of completion of discharge. Any attempt to enforce the lien before the completion of the above time frame is liable to the deemed premature and an attempt to exercise the lien after the above time frame would have been infructuous. Apart from clause 41 (B) of C/P there were other practical difficulties also which have been referred to in the earlier paragraphs. These factors would have rendered the exercise of lien or an attempt to exercise it, under the circumstances of the case, an impossibility, not merely an inconvenience."

17. Clause 8 of the charter party is a lien clause which provides that owners shall have lien on the cargo for freight, dead freight, demurrage and that the charterers shall remain responsible for dead freight and demurrage incurred only at the port of loading. It further provides that the charterers shall be responsible for freight and demurrage incurred at the port of discharge, but only to such extent as the owners have been unable to obtain payment thereof by exercising lien on the cargo. Clause 35 of the charter party provides that all the liability of the charterer shall cease on completion of

loading, owners having lien on cargo for freight, dead freight and demurrage. Thus clauses 8 and 35 of the charter party exonerate a charterer from any liability on account of demurrage the moment the ship leaves the loading port. Thereafter, in case of any demurrage incurred by the respondent at the discharge port, the buyer shall be responsible for the same. However, clause 41(B) of the charter party provides that 90% of the freight is to be payable within 7 days of the submission of freight bill and that the 10% of the balance payment together with dispatch (if any) or less dispatch (if any) is payable by the charterer within 90 days of completion of discharge on production of a copy of charter party, copy of Bills of Lading and receipt for payment of dispatchers fee at the loading port(s) (if applicable). However, clause 41 B states that 10% of the balance freight along with demurrage shall be payable within 90 days of completion of discharge.

18. Because of clause 8 and 41 B the liability of the charterer continues even after loading at the port of loading, in case the owner is unable to obtain payment of 10% of freight with demurrage (if any) by exercising his lien ninety days after discharge of goods. Because of clause 41 B the amount of demurrage could not be demanded before handing over the cargo to the receiver of the goods and the

respondent could not exercise his lien. Therefore creation of lien on the goods was ineffective as the same was to be exercised only after discharge of goods. In the circumstances the majority award that the respondent was unable to exercise his lien does not suffer from any such illegality which will shock the conscience of this court. This interpretation of the terms of the contract can also not be termed contrary to the contract so as to be interfered with by this court in exercise of its jurisdiction under section 34 of the Arbitration and Conciliation Act,1996. The dissenting award has laid emphasis on the word ' impossible ' whereas clause 8 contemplates the liability of the petitioner to the extent the respondent is ' unable ' to obtain payment by exercising the lien. The arbitrators have held in detail the contingency of exercise of lien by the respondent. In interpreting the lien clause the majority award has considered a number of judicial pronouncement and holding that merely giving a right of lien is not sufficient but it has to be effective one also and in case the goods are discharged, the lien cannot be exercised. The law is clear that cessation of liability is coextensive with creation of an effective lien but the lien should be effective for the liability to cease.

19. The majority award has held that it is of no use for the ship owner to be given a right of lien unless he can exercise it so as to get

money due to him and in the circumstances the lien for demurrage is not effective and the petitioner is not relieved of its liability. The dissenting award by the Arbitrator, Mr.R.S. Saran, has gone on the premise that process of exercise of lien may not always be a simple affair and difficulties do arise and the lien being ineffective could either be caused on account of illegality or because of impossibility. According to him the word "impossibility" means impossibility and it is not enough for the ship owners to show commercial inconvenience or difficulty.

20. Perusal of the charter agreement reflects that the liability of the petitioner subsists in case the owner of the ship is unable to recover the demurrage and once the goods have been discharged, it is not possible to recover the demurrage. If the goods are discharged and the demurrage cannot be recovered or it is not possible to recover, it will be inability of the owner of the ship to recover the demurrage and the liability of the petitioner/charterer will subsist. In any case, the interpretation of contract as given by the majority arbitrators, is possible. Though the dissenting award has a different interpretation, but it does not lead to any inference that the interpretation given by the majority award is not feasible. The majority award is not to be interfered with or inferences which are drawn by the majority

Arbitrators are not to be substituted by this Court with the inferences arrived at in adjudication of objections under Section 34 of the Arbitration & Conciliation Act, 1996 in the present facts and circumstances of the case.

21. The learned counsel for the respondent has also relied on a decision of the single Judge of the High Court of Judicature of Bombay in Arbitration Petition No.163 of 2003, Mineral and Metal Trading Corporation Limited Vs. John Frangos & Others dated 21st July, 2003 holding that the petitioner Undertaking is indulging in unnecessary litigation consuming the resources of the public sector undertaking and wasting the court time. In the said case also, the dispute was whether the ineffective lien of the owner of the ship will discharge the liability of the charterer to pay the demurrage. In the said case also, 5% of the balance freight together with demurrage was payable within 30 days of completion of discharge and acceptance of time sheets by both the parties. In this case relied on by the respondent, the majority Arbitrators had held that because of the similar clause 41(b) in the charter party agreement, it was not possible for the owner of the ship to exercise his lien on the cargo for recovery of demurrage, because the liability to pay the amount of demurrage by the receiver had arisen after cargo was discharged and

the time sheets had been accepted. While dealing with the objections of the petitioner corporation in that case also the learned single Judge had relied on various judgments and had rejected the contention of the petitioner that the liability of the corporation was discharged on account of lien created in favor of the owner of the ship. It was held that the amount of the demurrage could not be demanded before handing over the cargo to the receiver and the ship owner could not exercise his lien on the cargo after it passes to the hand of the receiver and consequently it was held that lien was ineffective and did not discharge the liability of the petitioner corporation.

22. Learned counsel for the petitioner has tried to distinguish the ratio of this case on the ground that in the case of MMTC (supra) before the Bombay High Court, the receiver of the goods had also given a bank guarantee to the petitioner corporation. Perusal of the judgment of the learned single Judge of the Bombay High Court reflects that the ratio of the decision is that in case the lien is ineffective, it will not discharge the liability of the charterer. The liability of the charterer was not held to be subsisting on the ground of bank guarantee being given by the receiver of the goods to the charterer, petitioner corporation. In the circumstances, the ratio of the Mineral and Metal Trading Corporation (supra) is also applicable

to the present case and the petitioner cannot contend that its liability stood discharged as the lien was given to the respondents/ship owner and it was for the ship owner to demonstrate the impossibility of exercising the lien. If the owner is unable to exercise lien, the liability of the petitioner corporation is not discharged. In any case the liability of the petitioner corporation not ceasing on account of ineffective lien of the respondent/owner is a possible plausible interpretation of the contract and the same cannot be interfered or set aside and/or substituted by the view now sought to be contended by the petitioner.

23. This is no more res integra that the Court cannot substitute its own decision and conclusions, in interpretation of a contract which is a matter for an arbitrator to decide. As appraisement of evidence by arbitrator is never a matter which the Court questions and considers because the parties have selected their own forum and the deciding forum must be conceded the power of the appraisement of the evidence. Reliance for this can be placed on 1992(2) RAJ 162 (SC) Himachal Pradesh Electricity Board Vs. R.J. Shah and Co.; AIR 1990 SC 1340, M/s. Hind Builders vs. Union of India; AIR 1989 SC 890, Sudharshan Trading Co. Vs. Government of Kerala and Anr; AIR 1989 SC 1263, Food Corporation of India Vs. Joginder Pal Mohinder Lal

and Anr.; AIR 1971 SC 1646, Union of India Vs. Kalinga Construction Co., AIR 1999 (3) SC 3869, Arosan Enterprises Vs. Union of India. There are limits for judicial reviewability and the Courts exercise limited jurisdiction in the proceeding for setting aside an award under Section 34 of the Arbitration and Conciliation Act, 1996. The Courts do not exercise appellate jurisdiction over the verdict of an arbitrator and as such cannot go into the merits of the case nor the court should re-appraise and re-examine the evidence led before the arbitrator.

24. In AIR 1991 SC 945, S Harcharan Singh Vs Union of India; AIR 1992 SC 2192, Hindustan Construction Co Ltd. Vs State of J & K and (2003) 8 SCC 4, Continental Construction Ltd. Vs State of U.P it was held by the Apex Court regarding interpretation of the terms of the contract that the Court cannot substitute its own interpretation with that of the arbitrator so long as the interpretation of the arbitrator is a possible one. If an interpretation to a particular clause of agreement is given by the Arbitrator, such an interpretation although may be erroneous, is final and binding and Court does not have power to upset the findings. However, if Arbitrator passes an award by ignoring the stipulation and prohibition contained in the agreement, then Arbitrator travels beyond his jurisdiction. The objector is unable to

show as to which clause or term of the agreement has been ignored by the Arbitrators.

25. The arbitrator has given sufficient and cogent reasons for deciding the claims of the claimant and for rejecting counter claim nos. 1 & 2 of the objector in the present facts and circumstances. In the circumstances, it cannot be said that the Arbitrator has exceeded in his jurisdiction. There does not seem to be any errors in the inferences. Even if it is presumed that there is any error in the inferences, the same shall be error within their jurisdiction and this Court will not substitute its decision with the decision of majority Arbitrators who has considered all the material which is also relied on by the objector. Though a ground has been taken that the Arbitrator has not considered a material document but no such document has been pointed out by the learned counsel for the objector.

26. Under the award, the petitioners have been directed to pay respondent 10% of the balance freight and the petitioner's contention of being not liable to pay demurrage at discharge port was rejected. The award rejecting the contention of the petitioner about being not liable to pay demurrage at discharge port is, therefore, sustained. The other claims awarded to the respondents have not been challenged.

The majority award had also awarded reimbursement of US$ 8594.86 to the petitioner on production of original voucher or other satisfactory proof of payment in respect of which no original voucher or other satisfactory proof of payment has been produced and consequently the petitioner will not be entitled for over-age insurance premium of US$ 8594.86 which is now disallowed as the petitioner has still not produced any original voucher or any other satisfactory proof of payment. No other findings of the Arbitrators have been challenged. The objections by the petitioner in the facts and circumstances are without any merit and, therefore, they are dismissed. However, parties are left to bear their own costs.

December 5th, 2007 **ANIL KUMAR J.**

'K/Dev'